

(1978) 04 GUJ CK 0002
In the Gujarat High Court
Case No : First Appeal No. 708 of 1977

Gujarat State Fertilizers Co. Ltd.

APPELLANT

Vs

Deepak Nitrite Ltd.

RESPONDENT

Date of Decision : 21-04-1978

Acts Referred:

Arbitration Act, 1940 — Section 20, 37
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27(1)
Limitation Act, 1963 — Article 137

Citation : AIR 1979 Guj 83 : (1979) 20 GLR 306

Hon'ble Judges : B.K. Mehta, J

Bench : Single Bench

Advocate : M. Setalwad and M.M. Thakore, for Bhaishanker Kanga and Girdharlal, for the Appellant; J.I. Mehta, D.D. Valeria and G.N. Shah, for the Respondent

Judgement

1. This appeal is directed against the order of Joint Civil Judge (S. D.) Baroda directing to file the arbitration agreement contained in the contract of supply of Dec. 16, 1970 executed by and between the parties hereto since the disputes and differences had arisen in the matter of the price of supply of liquid ammonia by the defendant-Corporation to the plaintiff-Company, and for appointment of arbitrators to arbitrate upon the said disputes, and for certain other incidental relief's in the matter. In order to appreciate the grievance of the appellant-defendant-Corporation in its proper perspective, it would be profitable to advert to a few facts which led to the suit between the parties.

2. The respondent-plaintiff-Company was incorporated somewhere between June and August 1969. However, one Shri S. S. Agrawal, who happens to be the director of the plaintiff-Company, was, before the incorporation of the Company, carrying on business under the firm name and style as "Frontier Chemical Works". He was desirous of promoting a Company for purposes of carrying on the business of manufacture of Sodium Nitrate having regard to its heavy internal market demand on account of short supply of its import. Said Shri

Agrawal, therefore, applied for a Letter of Indent for the purpose of establishing a factory in Gujarat for manufacturing Sodium Nitrate and Sodium Nitrite. Therefore, in 1967, negotiations commenced between the said promoter of the plaintiff-Company on one hand and the defendant-Corporation on another for assured supply of liquid ammonia which is the basic raw material for the manufacture of Sodium Nitrite etc. Accordingly a request was made by the aforesaid firm Frontier Chemical Works by its letter of May 8, 1967 to the defendant-Corporation to draw and forward a draft agreement containing the terms and conditions under which the said Corporation would supply liquid ammonia to the proposed Company. It is claimed by the plaintiff-Company that the defendant-Corporation, under the cover of their letter of May 15, 1967, forwarded a draft agreement to the aforesaid firm. It is claimed on behalf of the plaintiff-Company that Clause 3 of the draft agreement, inter alia, provided the price at which the liquid ammonia would be supplied and the basis of the price offered, subject to the firm's final sale price to be varied according to the fluctuations in the prices of the raw materials of liquid ammonia, which would be exclusive of all taxes, duties and incidental charges. On the eve of the incorporation of the plaintiff-Company, the aforesaid firm Frontier Chemical Works addressed a letter to the defendant-Corporation on May 2, 1969, inquiring as to what the price of ammonia was. The defendant-Corporation by their letter of May 10, 1969 stated that the price was Rs. 1,050 per M. T. ex-factory for quantity of over 1000 M. T. per annum. The aforesaid Shri Agrawal thereupon contacted the then General Manager of the defendant-Corporation, one Shri B. C. Dalal, and inquired whether the Corporation would be able to supply to the Company with about 10 M. T. of ammonia per day, as the Company intended to start immediately the Sodium Nitrite Unit in the State of Gujarat. The defendant-Corporation, therefore, by their letter of June 18, 1969, expressed their readiness to satisfy the proposed Company's requirements. After the incorporation of the Company somewhere before August, 1969, a letter was addressed on behalf of the plaintiff Company to the defendant-Corporation on August 30, 1969, informing the defendant-Corporation about the registration of the Company and requesting them to give a Letter of Assurance that they would be supplying the requirements of ammonia so as to enable the plaintiff-Company to apply for conversion of the Letter of Indent into an Industrial Licence. The defendant Corporation, by their letter of Sept. 15, 1969, gave the required assurance. On Oct. 2, 1970, a draft agreement was handed over to one Shri Adi Amroliwala, who happens to be the Executive of the plaintiff-Company containing the terms and conditions of the supply of ammonia. The plaintiff-Company approved the said draft agreement and informed the defendant-Corporation by its letter of October 8, 1970. Accordingly, on December 16, 1970, a contract for supply of liquid ammonia was entered into by and between the parties, whereby the defendant-Corporation agreed to sell and supply to the plaintiff-Company for a period of five years from the date of the delivery of the first commencement at the rate approximately of 10 M. T. per day. Cl. 3 of the said contract provided that, "the price at which the seller will supply liquid ammonia to the buyer will be

such as is prevailing from time to time at the time of despatch; such price shall be net and exclusive of all taxes, duties and charges and will be subject to revision from time to time". Clause 9 of the said contract provided for arbitration of disputes and differences arising between the parties. It is claimed by the plaintiff-Company that it was envisaged between the parties for commencement of the supply of liquid ammonia not later than March 31, 1972. Since the plaintiff-Company could not commission its factory by the beginning of the year 1972, a letter of Feb. 2, 1972 was addressed to the defendant-Corporation postponing the commencement of supply to July, 1972, which letter was acknowledged by the defendant-Corporation by their letter of February 11, 1972. Meanwhile an anomalous situation arose as a result of the excise duty proposed by the Union Government in its Budget for the financial year 1973-74 whereby a duty was suggested on Naphtha which is an important raw material for manufacturing liquid ammonia, the rate of which depended upon its varied user. Since the defendant-Corporation had been using Naphtha for manufacturing liquid ammonia, which though a petro-chemical item and not fertilizer, the plaintiff-Company was informed by their letter of June 19, 1972 that the current price for the supply of liquid ammonia would be Rs. 1,670 per M. T. against Rs. 1,050 as agreed between the parties under the aforesaid contract. The plaintiff-Company by its letter of July 18, 1972 also made representation to the Central Board of Excise and Customs, New Delhi, as advised by the defendant-Corporation, requesting the Board to adopt a rational basis for the levy of excise duty on Naphtha used for manufacturing chemical products. The plaintiff-Company had also inquired from the defendant-Corporation by its letter of July 29, 1972 as to the exact component of excise duty on the original price quoted and also that on the increased price quoted by the defendant Corporation. The plaintiff-Company claims that it was orally informed that the excise duty on Naphtha, reflected in the ammonia price was Rs. 620 per M. T. of ammonia. The matter rested there for some time, though the supply of liquid ammonia commenced from Nov. 1972. According to the aforesaid contract of supply, which provided effective period of five years from the date of commencement of supply, the said contract was, therefore, to remain in force up to November 1977. The plaintiff-Company, however, informed the defendant-Corporation by its letter of Jan. 27, 1973 that they would be making payment of the price of the goods supplied under protest or as provisional payments subject to re-adjustment which may be necessitated as a result of the final decision as to rate of excise duty. The defendant-Corporation by their letter of February 2, 1973, informed the plaintiff-Company that their invoices were final and not provisional. To the surprise of the plaintiff-Company, it received a letter from the defendant-Corporation March 21, 1973 informing that the Corporation has decided to revise the rates and the current rates for supply of liquid ammonia would be Rupees 1,840 per, M. T. and requested the plaintiff-Company had no other alternative course open to it for obtaining its requirement of ammonia the question of confirming the acceptance of the revised prices did not arise though it was very much on higher side. The defendant-Corporation, however, by their letter of March 29, 1973 assured the

plaintiff-Company that the immediate upward revision had to be resorted to having regard to "the increased cost of production and that the Corporation always believed in having reasonable price structure. The supply of liquid ammonia continued thereafter at the revised price of Rs. 1,840 per M. T. Again, pursuant to the new budget by the Union Government for the financial year 1974-75, the plaintiff-Company received from the defendant-Corporation a cable of March 6, 1974 informing the Company that there would be a revision in the price of ammonia with effect from March 1, 1974. By a further telegram of March 9, 1974, the defendant-Corporation intimated that the revised basic price would be in the vicinity of Rs. 5,000 to Rs. 6,000 per M. T, and, therefore, called upon the plaintiff-Company to deposit a sum of Rs. 3,200 per M. T. over and above the price then paid by the plaintiff-Company which deposit would be subsequently adjusted. The Plaintiff-Company, therefore, by its letter of March 16, 1974, lodged its protest against the exorbitant increase in the price of ammonia. The plaintiff-Company also placed on record by the foresaid letter that the defendant-Corporation was not justified in revising the prices on the ground of increased excise duty incidence since Naphtha used for manufacturing a product which is classified as fertilizer and/or petro-chemical would not be liable to the increased excise duty, at Rs. 2,600 Per K. L. of Naphtha, and ammonia was admittedly classified as fertilizer and/or petro-chemical product. The defendant Corporation by their letter of March 8, 1974 referred to the discussion which the representatives of the plaintiff-Company had with the Corporation Officials, but informed that the decision for revised price was taken under circumstances beyond their control. In the meantime, the defendant-Corporation by their cable of March 16, 1974 intimated the plaintiff Company that the price of ammonia had been revised at Rs. 4,915 per M. T. with effect from 2nd March - 1974. The plaintiff-Company again by its letter of March 19, 1974 lodged, the protest against the unreasonable increase in the price and pointed out to the defendant-Corporation that the Fertilizer Corporation of India Limited, who were consuming 100 per cent Naphtha for manufacturing ammonia, had maintained their Prices at the uniform level of Rs. 2,550 as against the defendant-Corporation, who were consuming only 40 to 50 per cent of Naphtha in manufacturing ammonia. However, pursuant to the decision, of the Petroleum Minister announced in the Parliament on March 25, 1974 to reduce the prices of Naphtha for the manufacture of petro-chemicals, the defendant-Corporation by their telegram of March 27, 1974, intimated the plaintiff-Company that the price of ammonia -was reduced from Rs. 4,915 to Rs. 4,099 with effect from- March 27, 1974. The supply of the liquid ammonia continued thereafter by the defendant-Corporation -and the plaintiff-Company made payments. at the rate of Rs. 4,099 per M.T. under protest and subject to the reasonable prices being fixed. On July 2, 1975, the plaintiff-Company addressed a letter to the defendant-Corporation setting out the relevant facts and circumstances and particularly the payments by the plaintiff-Company from March 6, 1974, the price of liquid ammonia at the rate of Rs. 4,099 under protest and which price the defendant-Corporation was not entitled to recover in view of the Price clause

contained in the supply contract of December 16, 1970 and, therefore, contended that the defendant-Corporation were not entitled to fix any prices arbitrarily and/or capriciously and, therefore, called upon the said Corporation to make refund of the amount which , has been charged by the Corporation in excess of the price which had to be reasonable having regard to the over-all circumstances of the question in dispute. The defendant-Corporation by their letter of August 13, 1975 denied that their prices had to be fixed keeping in view any structure or circumstances, and the revision of the prices had been made -on the basis of the cost of production and other factors obtaining from time to time. The defendant-Corporation invited the attention of the Plaintiff-Company that it had failed to take delivery from March 31, 1972 as originally agreed between the parties and, therefore, rendered itself liable in damages to the Corporation. They declined to make the refund of any part of the price to the plaintiff-Company. Some correspondence had ensued between the parties thereafter in this connection. Ultimately, however, the plaintiff-Company by its letter of September 13, 1975 claimed from the defendant-Corporation a sum of Rs. 78,32,391 being the amount recovered in excess of the reasonable price with effect from March, 1974 till the date of the said letter. The plaintiff-Company, therefore, pursuant to Clause 9 of the contract of supply of Dec. 16, 1970, appointed Shri J. C. Shah, former Chief Justice of India, as a sole arbitrator and called upon the defendant-Corporation to concur in this appointment as such. The defendant-Corporation by their letter of September 22, 1975 repudiated the plaintiff's claim and declined to refer the dispute between the parties to arbitration. The plaintiff-Company thereupon by its letter of September 26, 1975 appointed said Shri J. C. Shah as their arbitrator and called upon the defendant-Corporation to appoint their arbitrator so that the reference to the two arbitrators could commence. The defendant-Corporation again by their letter of October 10, 1975, refused to appoint their arbitrator on the ground that no genuine dispute to the arbitration existed and contending further that the appointment of Shri J. C. Shah as a sole arbitrator would be without jurisdiction. The plaintiff-Company, therefore, called upon the defendant-Corporation by its letter of Oct. 18, 1975, to appoint an arbitrator on their behalf failing which the plaintiff-Company would request Shri J. C. Shah to act as a sole arbitrator. The attorneys of the defendant-Corporation sought some time for obtaining instructions from the Corporation. The plaintiff-Company again by their attorneys' letters of Nov. 11, 1975 and Nov. 21, 1975 requested the defendant-Corporation to appoint their arbitrator. The defendant-Corporation had sent no reply to the said letters (reminders). However, the defendant-Corporation by their cable of Sept. 24, 1975 and also by their letter of the same date intimated the plaintiff Company that the price of liquid ammonia per M.T. had been revised from Rs. 4,099 to Rs. 2,400 with effect from 24-9-1975. In these circumstances, the plaintiff was compelled to file the suit in the Court of Civil Judge (S.D.) at Baroda being Special Civil Suit No. 140 of 1976 to file arbitration agreement and to make reference to Shri J. C. Shah or to some other person to be appointed arbitrator to arbitrate and decide the dispute between the parties.

3. The defendant-Corporation resisted the suit contending, inter alia, that the Court had no jurisdiction to direct them to file the arbitration agreement and to make reference accordingly, inasmuch as there was no valid or justifying dispute between the parties which would require arbitration for its resolution, and in any case, the plaintiff's suit was barred by law of limitation and the Court should refuse to exercise its discretion in the matter since the plaintiff was guilty of laches and gross delay and especially because two suits involving similar facts and concerning the effect of the alleged representations and the clause regarding the price which are identical with those involved in the present dispute were pending before the same Court in respect of the sale of liquid ammonia by the defendant-Corporation to the other parties.

4. The parties have filed necessary documents in support of their averments in, their rival pleadings.

5. The learned Judge rejected these contentions of the defendant-Corporation and by his order of May 7, 1977 directed the parties to nominate the sole arbitrator if they mutually agree or in case of disagreement to appoint their respective arbitrators within one month from the date of the order, and in case of their failure, the Court will appoint arbitrator to decide the dispute and to file the award in the Court according to its directions. It is this order of the learned Civil judge (S.D.) Baroda, which has been challenged by the defendant-Corporation by way of this appeal.

6. At the time of hearing of this appeal, the learned counsel on behalf of the defendant-Corporation, which is the appellant before me, moved civil application for production of additional evidence comprising of the plaint and written statement filed in Special Civil Suit No. 310 of 1975 by M/s. Saurashtra Chemicals against the present appellant-Corporation and in Special Civil Suit No. 107 of 1975 in the Court of Civil Judge (S.D.) Baroda by M/s. Dhrangadhra Chemical Works Limited against the present appellant-Corporation, in order to support his contention that the learned Civil Judge ought to have refused to exercise his discretion to order filing of the reference u/s 20 of the Indian Arbitration Act, 1940, inasmuch as the said two suits involved similar facts and were concerned with the effect of the alleged representations and the price clause, which were identical with those involved in the present suit, out of which this appeal in respect of the supply and sale of liquid ammonia. This - Court has, by its order, refused to give permission to the appellant-Corporation to adduce additional evidence under O. 41, R. 27 of the C.P.C. for the reasons which were to be pronounced at the time of this final order.

7. In *K. Venkataramiah Vs. A. Seetharama Reddy and Others*, , the extent of the power of appellate Court to admit additional evidence was considered, and what would amount to substantial cause or requirement of the Court for granting permission to admit additional evidence was also, considered. *Das Gupta J.* speaking for the Court, held that under R. 27 (1), the appellate Court has the power to allow additional evidence not only if it requires such evidence "to enable

it to pronounce judgment", but also for "any other substantial cause". According to the Supreme Court, there may be cases where even though the Court finds that it is able to pronounce judgment on the state of record as it is, and so it cannot strictly say that it requires additional evidence to enable it to pronounce judgment, it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. The Court further ruled, following the decision of the Privy Council in AIR 1931 143 (Privy Council) that such requirement of the Court is not likely to arise ordinarily unless some inherent lacuna or defect becomes apparent on an examination of the evidence though such defect may be pointed out by a party or that a party may move the Court to supply the "defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. In view of this settled legal position, I have to decide whether additional evidence sought to be produced at this stage should be permitted or not. The learned counsel appearing for the respondent Company" before me vehemently opposed the application moved on behalf of the appellant-Corporation since the said Corporation did not make any effort in the trial Court to produce even uncertified copies of the documents in question much less to produce the certified copies thereof. It should be noted that there was some dispute before me on the question, whether the compilation containing these two documents produced by the Corporation in this Court and the copies whereof served on the respondent-Company was actually taken on record by J. V. Mehta, J. (as he then was) before whom this matter was part-heard, since he would not finish the hearing on account of his resignation pursuant to the unfortunate development in this Court as a result of elevation of Justice D. A. Desai to the Supreme Court. Affidavits and counter-affidavits have been filed on behalf of the appellant-Corporation and the respondent-Company before me. In my opinion, these affidavits do not serve any purpose since it is an admitted position that no order in writing recording the reasons has been passed by J. B. Mehta J. either allowing or disallowing the production of the additional evidence. Ultimately, therefore, it is a question, whether there is substantial cause to adduce additional evidence or the additional evidence is required by the Court for enabling itself to pronounce its judgment? I do not think that it can be successfully urged that the Court will require this evidence to enable it to pronounce its judgment because in the ultimate analysis, it is for the requirement of the Court for pronouncing its judgment in a more satisfactory manner that it may permit additional evidence to be adduced for clearing some obscurity. Court cannot exercise the discretion under O. 41, R. 27 (1) of the C.P.C. for filling in the lacuna in the case of a party or to give it a chance or an opportunity to have the second innings in the matter. The learned counsel for the appellant-Corporation urged that the Corporation has in terms raised this plea in sub-para (d) of para I of their written statement. He invited my attention to the draft issues submitted by the parties before the trial Court wherein Issue No. 4 of the draft issues submitted on behalf of the appellant-Corpn. and Issue No. 6 of the draft issues submitted on behalf of the respondent-Company raised the

question as to the effect of this plea of the discretion of the Court. I have not been able to appreciate how the specific plea in the written statement or the suggested issues in connection therewith can absolve the appellant-Corporation from establishing by satisfactory documentary evidence as to what are the issues involved in those two suits where the appellant-Corporation was a party-defendant. It may be that those two suits may be involving the interpretation of identical price clause, but unless it is established by satisfactory, documentary evidence as to what were the representations on which the plaintiffs in those suits were relying, it would not be possible for the trial Court, or for that matter this Court, to refuse to exercise the discretion if the exercise of which is warranted on the facts and in the circumstances of this case and under law. In that view of the, matter, therefore, the civil application for production of additional evidence should be rejected for the reasons stated hereinabove.

8. The real question, therefore, is, whether the trial Court was justified in making the order to file reference in the Court and in directing the parties to appoint the sole arbitrator or their individual arbitrators failing which the trial Court directed the appointment of arbitrator by the Court. The learned counsel for the appellant -Corporation contended that there is no valid or justifying dispute which requires to be resolved by arbitration and, therefore, the Court has no jurisdiction to make the order to file arbitration agreement as done by the trial Court. In this connection, he invited my attention to "the relevant pleadings and also took me through the important relevant correspondence ensued between the parties. In submission of the learned counsel for the appellant-Corporation, the letters between the parties do not indicate any dispute but on the contrary they establish that the respondent-Company had accepted the revision of the price. Merely because the respondent-Company made payments under protest would not indicate, much less establish, that there was a dispute between the parties since the appellant-Corporation has clearly rejected the frivolous objections of the respondent-Company by their letters of February 2, 1973 and March 29, 1973 and the respondent-Company has thereafter taken the supply of ammonia from the appellant-Corporation till they intimated by their letter of July 2, 1975 that the Company was paying for the supply at the revised prices under protest since March 6, 1974. To quote exactly the words of the learned counsel, the respondent-Company has accepted the revision of the prices from time to time by paying for the supply at , that, rate and have never protested effectively except by making "some noises" here or there in some part of their correspondence. The crux of the problem therefore is whether there is really a dispute between the parties which requires to be resolved in terms of Clause 9 of the contract of supply? The answer, in my opinion, is obviously in the affirmative. It cannot be gainsaid that the price clause contained in the aforesaid supply contract provided that the seller would supply liquid ammonia to the buyer at the price which will be "Such as is prevailing from time to time at the time of dispatch". In other words, the appellant-Corporation agreed and undertook to supply liquid ammonia at the prevailing price from time to time. Whether

the term "price prevailing from time to time at the time of dispatch" would mean the price of the suppliers from time to time or the market price, or the reasonable price is the moot question. The price clause is so ambivalent that there is bound to be dispute between the parties. The appellant-Corporation wants to construct the prevailing price at the time of dispatch to mean the price fixed by the suppliers as prevailing from time to time. On the other hand, the respondent-Company seeks to interpret the term, "prevailing price at the time of dispatch" to mean the reasonable price. In support of this interpretation, the respondent-Company sought "to rely on the corresponding Clause 3 of the draft agreement forwarded by the appellant-Corporation under the cover of their letter of May 15, 1967. Clause 3 provided as under:

"Price:

The prices at which the seller will supply liquid ammonia to the buyer will be-

1. For Over 100 tonnes.

(a) Rs. 1,050 (Rupees one thousand and fifty only) per tonne of liquid ammonia delivered at the seller's factory in the buyer's lorry tankers.

(b) Rs. 1,140 (Rupees one thousand one hundred forty only) per tonne of liquid ammonia delivered at the seller's factory in buyer's own cylinders.

(c) Rs. 1,190 (Rupees one thousand one hundred and ninety only) per tonne of liquid ammonia delivered at the seller's returnable cylinders.

2. For quantities less than 100 tonnes

Rs. 1.50 (Rupees one and paise fifty "intention of the parties, the price because only) per kilo of liquid ammonia delivered at seller's factory in seller's returnable cylinders. would have been similarly worded is one which we find in the draft agreement.

The price of Rs. 1,050 per tonne has been arrived at on the basis of raw materials & prices of Naphtha at Rs. 106 per tonne (based on a calorific value of 10,000 kcal/kgm). Associated Gas at Rupees 80 per 1000 NM³ (based on a calorific value of 10,000 kcal/NM³) Electric power at 6 paise per Kwh and water at 0.75 rupee per 1000 gallons. If there would be any fluctuations in the raw material prices, they would be related in the final selling price of "ammonia which would be mutually agreed upon by both the parties.

The above said prices shall be net and exclusive of all taxes, duties or charges like sales tax, octroi delivery expenses, etc.

9. It is no doubt that the price clause in the contract of supply finally executed between the parties was not in pari materia with the aforesaid Clause 3 of the draft agreement. In my view, however, the price clause as contained in the final contract of supply executed between the parties really created difficulties, inasmuch as it did not give any indication clearly as to how the prevailing price

was to be ascertained. If the price clause is to be interpreted as claimed by the appellant-Corporation as price fixed by them, it may be tantamount to saying that it can be any price irrespective of the realities. Prima facie I do not think that this can be the intention of the parties. In that case, the price clause would not have been worded as it had been. If the intention of the parties was as claimed by the appellant-Corporation the price clause would not have stated that the supply would be at the prevailing price. If that had been the intention, it would have been provided that the seller would supply liquid ammonia to the buyer at the price to be fixed by the suppliers from time to time. In my opinion the word "Price" gets its colour in the present context from the word "prevailing", on behalf of the appellant-Corporation, it has been strenuously urged that there is no warrant to introduce the concept of reasonable or fair price in the context of the price clause which emerged in the supply contract ultimately executed between the parties. If the concept of reasonable or fair price was the intention of the parties the price plans could have been similarly worded as one which could find in the draft agreement.

This submission on behalf of the appellant corporation was sort to be 45 by the learned counsel of the appellant corporation by inviting my attention to the averments made in para 25 by the client, where it is stated that though no working method has to how price chargeable was to be arrived at work stipulated in the agreement itself, it was understood and agreed that the price chargeable shall be reasonable and realistic and in consonance with the rates prevailing on the market and depending in the cost production, and the other factors obtaining from time to time keep in, however in view the basic structure of the price as was informed by the defendant in draft agreement during the negotiations and those assurances and understanding were conveyed and reiterated by the defendant from time to time as stated above in view of these averments it was argued in behalf of the appellant corporation the respondent company admits that in effect and substance the appellant corporation gave certain assurances and agreed that the price chargeable shall be reasonable and realistic and in accordance with the prevailing rate in the market depending upon the cost of production it was therefore further submitted on behalf of the appellant corporation that unless these new agreement subsequently alleged to have been arrived at between the parties did not provide for arbitration of the disputes or differences arising between the parties the court cannot exercise its jurisdiction to direct the parties to file arbitration agreement contained in the original contract of supply the learned counsel for the appellant corporation relied on the decision of the learned single judge of the Bombay High Court in *Ramdas Dworkadas Vs. The Orient Pictures*, holding that where the rights and liabilities created by an agreement between the parties containing an arbitration clause were materially altered by a subsequent agreement which did not contain such a clause, a suit based on both the agreements was maintainable in absence of reference to arbitration under the subsequent agreement. It is no doubt true that the respondent-Company has made averments in para 20 of its plaint in the suit

that since there was no method prescribed in the price clause as to how the prevailing price was to be ascertained, it was understood and agreed that the price chargeable by the appellant-Corporation would be reasonable and in tune with reality, prevailing in the market and depending on the actual cost of production, which understanding was reiterated by the appellant-Corporation from time to time.

10. I do not think that it is possible to spell out a new and subsequent agreement between the parties so as to modify their right and liability under the first agreement. The case of the respondent-Company, as disclosed in the plaint, in effect and substance, is that there was clear understanding between the parties at the time when the contract for supply was effected between them that the prevailing price that would be charged would not be de hors the reality and the actual cost of production and the appellant-Corporation had assured the respondent-Company from time to time accordingly. I have, therefore, not been able to appreciate how the decision of the Bombay High Court in Ramdas's case (supra) can be of any assistance to the cause of the appellant-Corporation. The learned counsel for the appellant-Corporation very fairly conceded that if the Court takes the view which I am indeed (taking) that the understandings and assurances alleged were part and parcel of the contract of supply, and there was no subsequent agreement arrived at between the parties, the decision in Ramdas's case (supra) would not be applicable. Blackwell J. in Ramdas's case (supra) observed at p. 744 (of Bom LR): (at p. 334 of AIR) as under:

"I think that the subsequent agreement evidenced by Exhibit B conferred upon the plaintiff a right which he had not previously got and imposed upon the defendants a liability which they had not previously undertakenIn my opinion, the arbitration clause has no applicability whatever to these new rights and liabilities so imposed and conferred. In my opinion an arbitrator or arbitrators appointed under the original agreement would have no jurisdiction to entertain any dispute arising between the plaintiff and the defendants in respect of the new agreement. Moreover the validity of the fresh arrangement evidenced by Exhibit B to the plaint is disputed by the defendants. The arbitrator or arbitrators appointed under the first agreement would certainly have no jurisdiction to determine whether the second alleged arrangement was or was not binding upon the plaintiff and the defendants, or what effect it had upon the provisions of the first agreement."

11. I do not think that the ratio of the decision in Ramdas Dwarkadas Vs. The Orient Pictures, can be pressed into service in the present context before me. Similarly, the ratio of the Court of Appeal in Turnock v. Sartoris (1889) 43 Ch D 150, which was also a case of two agreements where the subsequent agreement did not contain an arbitration clause, the Court held that it would not be right to split up the action by referring to arbitration the matters arising under the lease, leaving the action to proceed as to the other matters, and that even if the arbitration clause could be construed so widely as to cover all the matters in

respect of " which damages were claimed, it would not be proper to refer them to an arbitrator, as he would have no power to determine the construction of the agreement and its effect upon the provisions of the lease, cannot be pressed into service in the present context before me.

12. The learned counsel for the appellant-Corporation, therefore, made an attempt to persuade me that having regard to the correspondence which has passed between the parties, it is clear that though the differences arose between the parties" regarding the price clause in about Jan.-Feb., 1973, the respondent-Company appears to have raised effective dispute regarding the price for the supply of liquid ammonia for the first time by its letter of July 2, 1975, when it set out the genesis of its dispute and invited the attention of the appellant-Corporation that since 6th March, 1974, the respondent-Company was paying the price for the supply under protest, and it was entitled to a refund of such amount as was in excess of the reasonable price and requested for continuous supply charging reasonable price therefor. The exact amount of the claim for refund was to be intimated in due -course on hearing from the appellant-Corporation the basis of the price charged. In submission of the learned counsel for the appellant-Corporation, the earlier correspondence clearly shows that there was dispute between the parties and the appellant-Corporation has in no unmistakable terms informed the respondent-Company by their letters of 2nd Feb., 1973, 26th March, 1973 and, 29th March, 1973, denying the right of the respondent-company for making provisional payment and rejecting there quest for re-adjustment of the price ultimately. The learned counsel for the appellant-Corporation, therefore, submitted that the arbitration suit filed by the respondent-Company April 8, 1976 was clearly time barred and the Court has no jurisdiction to refer to the arbitrator any dispute, assuming with out admitting that there was one, which arose prior, to April 8, 1973, since the application to file, an arbitration agreement lift the Court would be governed according to "Art: 137 of the Limitation Act, 1963 -corresponding to Art. 181 of the Limitation Act, 1908. According to, the learned counsel for the appellant-Corporation, the limitation would begin to run under Art 137 when the right to apply accrues to a party and for an application under S. 20 of the Arbitration, Act Such right accrues when the dispute or difference arises between the parties. In the present case, the learned counsel for the appellant-Corporation submitted that on the own showing of the respondent-Company; the dispute arose for the first time in Jan., .1973 when the respondent-Company by its letter of Jan. 27, 1973 produced at p. 73 of the paper-book informed the appellant Corporation to make the payment on account of excess duty on Naphtha to the authorities concerned under protest since the case of reduction of excise duty on Naphtha with retrospective effect was accepted by the then Minister for Petroleum and Chemicals of the Union Government, and necessary instructions were issued in that behalf and, therefore, requested the appellant-Corporation to supply liquid ammonia on the provisional payment of price at the revised rate subject to re-adjustment in view of the final decision on the subject" in support of this submission, the learned

counsel for the appellant-Corporation relied on the decision of Allahabad High Court in *L. Amarnath Vs. The Union of India (UOI) and Others*, . It is no doubt true that this decision of Allahabad High Court in *L. Amarnath's case (supra)* is held to be no longer a good law by the subsequent decision of a Division Bench of the same Court in *Union of India (UOI) Vs. Mohamad Usman*, so far as the previous decision held that Art. 181 of the Limitation Act, 1908 would apply to all applications irrespective of the fact whether they were under the CPC or not. The Division Bench of Allahabad High Court in *Mohamad Usman's case (supra)*, following the decision of the Supreme Court in *Sha Mulchand and Co. Ltd. (In Liquidation) Vs. Jawahar Mills Ltd.*, held that Art. 181 is confined to applications under the C.P.C. However, the said Article was held to be applicable to application under S. 20 of the Arbitration Act since the application is one "under the Code". "The Division Bench held in *Mohamad Usman's case (supra)* that since the difference arose clearly three years before the making of the application under S. 20, it would be clearly time barred. This decision of the Division Bench of the Allahabad High Court in *Mohammad Usman's case (supra)* is also no longer a good law in view of the decision of the Supreme Court in *Wazirchand Mahajan and Another Vs. Union of India (UOI)*, where a Division Bench of three judges, following a catena of decisions dating back to 1883 when a Division Bench of the Bombay High Court in *Bai Manekbai v, Manekji .Kavasji* ILR (1883) Bom 213 , right up to 1964, when the Supreme Court in *Bombay Gas Co. Ltd. Vs. Gopal Bhiva and Others*, , found it to be a settled position for over a period of 70 years that Art. 181 would apply only to applications which are made under the Civil P. Q, and, therefore held that Art. 181 would not govern application under S. 20 of the Arbitration Act since no provision in the Arbitration Act indicated contrary intention. This decision of the Supreme Court in *Wazir Chand Mahajan's case (supra)*, in the context of Art. 181 of the Limitation Act, 1908, would have, clinched the issue of limitation against the appellant-Corporation and governed the question of " limitation arising under Art. 137 of the Limitation Act, 1963, in view of two Judges" Division Bench decision in *Town Municipal, Council, Athani Vs. The Presiding Officer, Labour Courts, Hubli and Others etc.*, , where it was held in the context of an application made to the Labour Court under S. 33-C(2) of the Industrial Disputes Act that " there was no reason to hold that the subsequent amendments of Arts. 158 and 178 of the Limitation Act, 1908 had the effect of altering the long acquired meaning of Art. 181 on the sole and simple ground that after the amendment the reason on the old construction was founded was no longer available and the view expressed by the Court as to restriction of Art. 181 to applications under C.P.C. only must be held to be applicable even when considering the scope and applicability of Art. 137 of the new Limitation Act, 1963. This settled position, however, seems to have been altered in view of the latest decision of three Judges" Division Bench of the Supreme Court in *The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma*, , where a contention was urged on behalf of the Electricity Board that the petition filed by the respondent on March 10, 1972 before the District Judge, Tellicherry under S. 16(3) of the Indian Telegraph Act, 1885 claiming

enhanced compensation for removal of trees standing on his property for purposes of laying electrical line was clearly time barred under Art. 137 of the Limitation Act, 1963, since the notice intimating fixation of compensation was served on March 4, 1969. The District judge dismissed the petition as time barred since he was of the opinion that Art. 137 of the 1963 Act would apply to such applications. The Kerala High Court, however, reversed that decision in view of its earlier decision in Kerala State Electricity Board Vs. Illippadical Parvathi Amma, , following the decision of two Judges' Division Bench in Athani Town Municipal Council's case (supra). The Kerala State Electricity Board carried the matter in appeal before the Supreme Court. A three Judges' Division Bench, consisting of Ray C. J., (as he then was), Beg and Shinghal JJ., found that the earlier decision in Athani Town Municipal Council's case (supra) was doubted in the later decision of the Supreme Court in Nityananda, M. Joshi and Others Vs. Life Insurance Corporation of India and Others, in so far as the two Judges' Division Bench in Athani Town Municipal Council's case (supra) did not find any compelling reasons to depart from the well established earlier view that the residuary clause contained in Art. 181 of 1908 Act applied only to application." Under the C.P.C. and held that that view would be applicable to similar questions arising under Art. 137 of the Limitation Act. Ray C. J., in Kerala State Electricity Board's case (supra), speaking for the Court, considered the scheme of the 1908 Act and found that in view of the entirely changed scheme of the 1963 Act, the earlier decision of the two Judges' Division Bench in Athani Town Municipal Council's case (supra) was a doubtful authority. The Supreme Court, therefore, held as under AIR 1977 SC 285

"The alteration of the division as well as the change in the collocation of words in Art. 137 of the Limitation Act, 1963 compared with Art. 181 of the 1908 Limitation Act shows that applications contemplated under Art. 137 are not applications confined to the Civil P. C. In the 1908, Limitation Act there was no division between applications in specified cases and other application as in the 1963 Limitation Act. The words "any other application" under Art. 137 cannot be said on the principle of ejusdem generis to be applications under the C.P.C. other than those mentioned in part I of the third division. Any other application under Art. 137 would be petition or any application under any Act. But it has to be an application to a Court for the reason that Ss. 4 and 5 of the 1963 Limitation Act speak of expiry of prescribed period when Court is closed, and extension of prescribed period if applicant or the appellant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application during such period." The Supreme Court, therefore, held that, in the case before it, the application contemplated under S. 16(3) of the Telegraph Act was necessarily application to the Court of District Judge and, therefore, Art. 137 would be attracted, and inasmuch as the same was presented before the District Judge three years after the accrual of the cause of action, the application was clearly time barred. The appeal was accordingly allowed. A strange position, therefore, arises in view of the three Judges' Division Bench decision in Kerala State

Electricity Board's case (supra). The net effect of this decision appears to be that the settled legal position about the residuary clause contained in Art. 181 of the old Limitation Act having been confined to applications under the Civil P. C. only and therefore not governing the applications under S. 20 of the Arbitration Act is reversed, and therefore by implication the decision of the three Judges' Division Bench of the Supreme Court in Wazir Chand Mahajan's case (supra) that Art. 181 did not govern applications under S. 20 of the Arbitration Act would not hold good. when the question of limitation arises under Article 137 of the new Act qua such applications under S. 20 of the Arbitration Act.

13. Art. 137 of the Limitation Act, 1963. provides as under:

(See Article below)

Art. 137 is in Part II of the Third Division. In Part I, the Legislature has provided in Art. 119 limitation for filing in Court of an award, or for setting aside an award or getting an award remitted for reconsideration under the Arbitration Act, 1940. Arts. 131 and 133 of Part I of the Third Division refer to applications under Cr. P. C. and Art. 132 refers to applications under "the Constitution of India. The Third Division is, therefore, not limited to applications under the Civil P. C. and Art. 137 should, therefore, consequently govern all applications or petitions under any Act (vide The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, not otherwise provided for in the Third Division.

14. On behalf of the respondent Company, an attempt was, therefore, made to persuade me that limitation would begin to run according to Section 37 of the Arbitration Act and my attention was particularly invited to the provision contained in sub-section (3) of S. 37 of the Arbitration Act, which provides as under:

""37 (3). For the purposes of this section and of the Indian Limitation Act, 1908, (9 of 1908) an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated."

I have not been able to appreciate how this provision would be of any assistance to the respondent-Company since the provision appears, to have been envisaged for applying the law of limitation to the proceedings before arbitrators. By sub-section (1) of S. 37 all the provisions of the Indian Limitation Act, 1908, have been made applicable to arbitration as they apply to proceedings in Court. In order to provide an answer to the question, how the limitation is to be computed, sub-section (3) prescribed notional or fictional commencement by providing that arbitration- would commence when one party to the arbitration agreement serves on the other, parties a notice requiring the appointment of - arbitrator, or when the -difference is "submitted to a named or designate arbitrator under the agreement. Under S. 3 of the Limitation Act a suit is instituted in ordinary cases

when the plaint is presented to the proper officer of the Court. Similarly by fiction of law a point is determined when arbitration is said to have commenced. However, in the present case before" me, I am concerned with a stage anterior to the commencement of the proceedings before the arbitrator, and in that context I .have been called upon to determine, whether application for filing arbitration agreement at that prior stage is within limitation or not I do not think there fore, S. 37(3) can be of much assistance to me for resolving the dispute raised on the point of limitation.

15. The Supreme Court in Wazirchand Mahajan and Another Vs. Union of India (UOI), has considered the scope of Section V of the Arbitration Act and repelled the contention advanced on be half of the Union of India before it that S. 37 of the Arbitration Act, 1940 indicated a contrary intention for Purposes of the commencement of the period of limitation. Shah J. speaking for the Court, held as under after quoting with approval the passage from the decision of the judicial Committee of the Privy Council in Ramdutt Ramkissen v. E. - D. Sassoon and Co. 56 I A 128: (AIR 1929 PC 103): -

"There is no doubt that Clause (1) of Section 37 of the Arbitration Act deals only with the authority of the arbitrator to

Description of Period of Time from

application. limitation. which period

begins to run.

137 Any other application for which Three years When the right

no period of limitation is pro- to apply accrues.

vided elsewhere in this Division.

deal with and decide any dispute refer red to him: it has no concern with an application made to the Court to file an arbitration agreement and to refer a dispute to the arbitrator. After an agreement is filed in Court and the matter is referred to the arbitrator, it is for the arbitrator to decide by the application of the law contained in the Limitation Act, whether the claim is barred. But S. 37(1) does not confer authority upon th4 Court to reject the application for filling of an arbitration agreement under S. 20 of the Arbitration Act because the claim is not made within three years from the date on which the right to apply arose. In dealing with an application for filing an arbitration agreement, the Court\\\\"must satisfy itself about the existence of a written agreement which is valid and subsisting and which has been executed before the institution of any suit, and also that a dispute has arisen with regard to the subject-matter of the, agreement which is within the jurisdiction of the Court. But the Court is not concerned in dealing (with) that application to deal with the question whether the claim of a party" to the arbitration agreements barred by the law of limitation; that question falls within the province of the arbitrator to whom the dispute is

referred."

In other words, the question is whether right to claim some relief as a result of reference to arbitration falls within the domain of arbitration. The contention advanced on behalf of the respondent Company is clearly misconceived. I have, therefore, to examine, whether the application for filing arbitration agreement in the Court is within the limitation or not. According to Art. 137 such application is to be made within three years from the date of accrual of the right to apply. The words, "when the right to apply accrues" mean when the right to apply first accrues. It cannot be gainsaid that there cannot be any right to sue until there is an accrual of the right asserted in the suit and its infringement, or at least clear and unequivocal denial, of that right by the defendant against whom the suit is instituted (vide AIR 1930 270 (Privy Council)). It is, of course, a question depending to a large extent upon the particular facts of the case and the relief sought. I have, therefore, to find out when the right accrued in favour of the respondent Company to apply for reference. The contention advanced on behalf of the appellant Corporation that the Court has no jurisdiction to refer to arbitrator any dispute which arose prior to April 8, 1973 is not of much substance in view of the decision of the Supreme Court in *Wazirchand Mahajan and Another Vs. Union of India (UOI)*. What claim should be actually allowed and what claim is time barred would be within the domain of the arbitrator that may be appointed as a result of the reference. It should be recalled that the supply of liquid ammonia by the appellant Corporation to the respondent Company commenced from Nov. 1972. Before the commencement of the supply of liquid ammonia, the appellant Corporation had informed by their letter of June 19, 1972 the respondent Company about the upward revision of price from Rs. 1,050 per M.T. to Rs. 1,607 since there was a proposal for levy of excise duty at different rates on Naphtha according to its use which was the main raw material for manufacturing liquid ammonia. On Jan. 27, 1973, the respondent Company wrote a letter to the appellant Corporation that it would be making payment of the price of the goods supplied under protest or as provisional payment subject to re-adjustment which may be necessitated as a result of the final decision of levying excise duty. It is no doubt true that the appellant Corporation have by their reply of Feb. 2, 1973 informed the respondent Company that their invoices were final and not provisional. Again on March 21, 1973, the appellant Corporation revised the price of liquid ammonia to Rs. 1,840 as against Rs. 1,607 per M.T. The appellant Corporation by their letter of March 29, 1973 assured the respondent Company that the Corporation believed in having reasonable price structure. Again, the price was revised on March 6, 1974 as intimated in the cable of the appellant Corporation of March 9, 1974 to the respondent Company that the revised basic price would be in the vicinity of Rupees 5,000 to Rs. 6,000 per M.T. and called upon the respondent Company to make a deposit of Rs. 3,200 per M.T. over and above the price paid by it and which deposit would be subsequently adjusted. The respondent Company, therefore, protested by its letter of March 10, 1974 by putting on record that the Corporation was not

justified in revising the prices on alleged ground of increased excise duty incidence on Naphtha used for manufacturing end product classified as fertilizer or petrochemical, in which case, the excise duty would, be at Rs. 2,600 per kilo litre and admittedly ammonia was a fertilizer or petro, chemical, product. on March 16 1974, the appellant-Corporation intimated the respondent-Company that the price of ammonia had been fixed at Rupees 4,915 per M.T. with effect from March 2, 1974. The respondent-Company again protested by its letter of March 19, 1974 against the unreasonable increase in the Price from time to time and point out that Fertilizer Corporation of India Limited had maintained their Prices at, the I uniform -level of Rs. 2,550. Surprisingly, the appellant-Corporation again" by their letter of March -27, 1974 intimated the respondent-Company that the price of ammonia was reduced from Rs: 4,915 to Rs. .4,099 with effect from March 27, 1974. It is in this background of repeated increase in the price on the ground of repeated increase in the price on the ground of increased excise duty incidence from time to time and surprising downward revision with effect from March 27, 1974, that the "respondent Company- was constrained to record its protest by putting the record straight and reminding the appellant-Corporation that it was paying the price as informed by the Corporation for the supply of ammonia under protest and that the Corporation "was not entitled to re the Price and, therefore, to make refund of the price so recovered in excess of the reasonable price due to them. The appellant-Corporation by their letter of August 13, 1975 denied that they were under any obligation to fix the prices keeping in view any structure or circumstances as suggested by the respondent Company and warned it that any Payment under protest or subject" to any condition would amount to violation of the terms of agreement which may compel the Corporation to discontinue the supply and to recover damages suffered by them, if any. The respondent-Company therefore by its letter of Sept. 13, 1975 claimed from the appellant- Corporation a sum of Rs. 78,32,391 being the amount recovered in excess of the reasonable price with effect from March 19, 1974 till the date of the said letter. In my opinion, therefore, it cannot be said that the difference arose between the parties in or about Jan. 1973 or there about. The appellant-Corporation was revising the prices from time to time, and ultimately it decided to revise the price with effect from 2 nd March, 1974 by raising it to Rs. 4,915 and again reducing it to Rs. 4,099 with effect from March 27, 1974 that the parties came to head and the differences crystallised. Merely because in the beginning of 1973, and thereafter, the respondent-Company, was drawing the attention of the appellant-Corporation about the unrealistic price policy, it cannot be said that the dispute in effect and substance, arose between the parties. As a matter of fact, the appellant-Corporation had in their cable of March 9, 1974 addressed to the respondent-Company stated as under:

"Further, to our telegram dated sixth regarding price revision stop to enable us to continue dispatches kindly deposit a sum of Rupees Three Thousand Two Hundred per metric tonne over and above the price, being paid by you stop

deposit will be adjusted against the revised price stop likely revised basic price will be around rupees five thousand to Rs. six thousand per tonne stop other terms and conditions remain the same"".

The respondent-Company by its letter of March 16, 1974 in the last para informed the appellant-Corporation that they would be drawing the material by making the payment of difference in price of Rs. 3200 per M. T. as desired under protest subject to re-adjustments. This proposed revision in the above cable was fixed at Rs. 4,915 per m. T. as intimated in the cable of March 16, 1974 of the appellant-Corporation. This was again revised downward and fixed at Rs. 4,099 with effect from March 27, 1974 as intimated in the telegram of the appellant-Corporation of March 27, 1974. This makes it clear that the respondent-Company was not knowing as to what exactly the price was to be paid on account of this revision from time to time atleast from March 27, 1974. In the circumstances, therefore, I am of the opinion that the dispute as to the price and the refund really arose between the parties when the appellant-Corporation refused by their letter of Aug. 13, 1975 to make refund as claimed by the respondent-Company in its letter of July 2, 1974 since from March, 1974 onwards the respondent-Company was required to make provisional payments which were to be adjusted against the price to be fixed as intimated in the cable of March 9, 1974. The application under S. 20 of the Arbitration Act to five arbitration agreement was made on April 8, 1976 and therefore was clearly within time and the contention of the appellant-Corporation that it was time barred should be rejected.

16. The learned counsel for the appellant Corporation therefore urged that the trial Court ought not to have exercised the discretion to direct the filing of reference having regard to the various circumstances namely (1) the conduct of the respondent-Company; (2) delay and laches on its part; (3) the nature of allegations and inquiry; (4) involvement of heavy stake, and (5) the disputes of similar nature pending between the parties. I do not think that on any of the alleged grounds the trial Court should have refused to exercise its discretion.

17. I will now deal with the grounds in the reversed order in which they are stated: The appellant-Corporation has not been able to establish or place on record sufficient material that disputes of similar nature were pending between the appellant-Corporation and other parties. There is nothing on the record to indicate as to what were the terms and conditions of the contract of supply between the appellant-Corporation and the other purchasers, namely, the Dhrangadhra Chemical Works Limited, and Saurashtra Chemicals, nor any material has been placed on record to satisfy this Court as to what was the nature of the disputes between the parties as disclosed from the correspondence between them, and what were the questions of issue in the suits. The 5th ground, therefore, is not at all borne out by the evidence on record.

18. The magnitude of stake can hardly justify the Court to refuse to implement and enforce the arbitration agreement between the parties. It is hardly required to be stated that the arbitrator appointed by the respondent-Company, or that

may be appointed by the Court, would be person/s of such repute, learning and experience that the parties would have no cause to make any grievance on that count. Having regard to the pleadings between the parties, I do not think that the trial Court was in any way in error in directing the filing of the reference because of the nature of the allegations and inquiry to be made therein. I do not think that the learned counsel for the appellant-Corporation was justified in reading in the plaint of the respondent-Company in para 25, that there were any allegations of fraud or want of bona fides which may justify the Court in refusing the reference to arbitration, The relevant part of the averments - relied on by the learned counsel for the appellant-Corporation in support of his third ground for refusal to exercise discretion reads as under:

"The contention of the defendants contained in their letter dated 25-3-1974 that the revision of price had to be made looking at their liabilities in procurement of inputs was untenable and more a colourful device in an attempt to justify the price increased. The plaintiffs submit that the prices as revised from time to time were exorbitant and totally untenable, having regard to the terms of the agreement and the assurances conveyed by the defendants from time to time."

I do not think that this allegation of colourful device, if at all it was one, can amount to allegation of fraud which may warrant the refusal of exercise 61 the discretion for reference to arbitration. I have not been able to appreciate as to how the nature of inquiry of this allegation can be said to be one which should not be entrusted to a competent arbitrator. Whether there was in - fact levy of excise on Naphtha used by the appellant-Corporation for manufacturing ammonia and whether its incidents really required increase in the price cannot be held to be such as to justify the Court in refusing to implement and enforce the arbitration agreement. There is no question of delay or laches on the part of the respondent-Company in making this application to the Court for filing the reference to arbitration. Of course, the question, whether the respondent-Company is entitled to refund of the whole amount as claimed by it in its plaint is a question within the do main of arbitrator having regard to the law of limitation and "other relevant factors that may be established in evidence before the arbitrator. I have not been able to appreciate how the conduct of the respondent-Company is found wanting by the learned counsel for the appellant-Corporation as to disentitle it for asking for reference to arbitration. At all relevant times, the respondent Company had abided by the revision of prices and made payments accordingly of course, under protest, and without prejudice to its right. I do not think that on that count alone the trial Court ought to have refused the reference to arbitration.

19. The result is that there are no justifying and compelling reasons for me to interfere with the ultimate conclusion of the trial Court to direct the appellant-Corporation to file reference to arbitration. The learned counsel for the appellant-Corporation, however, wanted me to crystallise the points on which the reference is to be made to the arbitrator, if in case the appeal of the Corporation is

rejected. I think that the learned counsel for the appellant Corporation was perfectly justified. I, therefore, propose to make the following order which would substitute the order made by the trial Court:

Upon reading the application (plaint) and the written statement dated 8th April, 1976 and 26th July, 1976, respectively, and the affidavits in support thereof presented to the trial Court, it is hereby ordered that the following matters in difference specified in the Schedule to this order, arising in this suit be referred for determination of the sole arbitrator as may be agreed upon by the parties hereto, and, in case of default, to two arbitrators one to be nominated and appointed by each of the parties hereto within six weeks from today, and in case of difference between the said two arbitrators to the umpire to be appointed by the Court after individual nomination and appointment is made as directed. It is further directed that in case of failure on the part of either of the parties, to appoint its/ their nominee, the Court will refer the following matters in dispute to the arbitrator of its choice and such arbitrator or arbitrators will make his/their award in writing on or before 31st March, 1979 and in case of the said arbitrator/s not agreeing in award, the umpire to be appointed by the Court is to make his award in writing within three months after the time during which it is within the powers of the arbitrator/s to make an award shall have ceased liberty to apply.

SCHEDULE

1. Whether the defendant-Corporation is under obligation to charge and recover reasonable price for supply of liquid ammonia having regard to the prevailing rate in the market and depending upon the cost of production?
2. Whether the defendant-Corporation had assured the plaintiff-Company that the price chargeable would be reasonable and realistic and in consonance with the rates prevailing in the market and depending upon the cost of production and other factors obtaining from time to time?
3. If answers to questions Nos. 1 and or 2 in the affirmative, what was the price which the defendant-Corporation was entitled to charge from time to time for supply of liquid ammonia?
4. Whether the claim of the plaintiff Company for refund or any part thereof is time barred?
5. Whether the plaintiff-Company is entitled to recover from the defendant Corporation a sum of Rs. 78,32,391 or any other sum by way of refund being the amount in excess of the price as above?
6. What should be the order of the costs?
20. The result, therefore, is that this appeal fails and is dismissed with the substitution of the order as directed above. The appellant-Corporation shall pay costs to the respondent-Company.
21. Appeal dismissed.